No. 18644

IN THE

United States Court of Appeals For the Ninth Circuit

PORT OF PASCO, a municipal corporation,
Appellant,

v.

PACIFIC INLAND NAVIGATION CO., INC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

CHARLES B. HOWARD
THOMAS F. PAUL
Proctors for Appellee.

SUMMERS, HOWARD & LEGROS
840 Central Building
Seattle 4, Washington

METROPOLITAN PRESS AND WESTERN SEATTLE, WASHINGTON

SUBJECT INDEX

TABLE OF CASES

ANNOTATIONS, STATUTES AND RULES

IN THE

United States Court of Appeals For the Ninth Circuit

PORT OF PASCO, a municipal corporation,
Appellant,

v.

PACIFIC INLAND NAVIGATION CO., INC.,
Appellee.

No. 18644

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

I.

STATEMENT AS TO JURISDICTION

Supplementing appellant's Statement as to Jurisdiction, appellee refers this Court to Stipulation on behalf of the appellant as presented in the U. S. District Court (Tr. 29) shortly after Petition for Exoneration from or Limitation of Liability was filed in this cause (Tr. 1). The offer of this Stipulation by appellant (claimant below) was in accordance with the procedure approved by the Federal Courts to enable a State Court to proceed with initial determination of issues as to liability and damages in a single claim limitation of liability case.

Petition of Republic of (South) Korea, (D. Ore., 1959) 175 F. Supp. 732, 735, 736;

Petition of Red Star Barge Line, (CA 2, 1947) 160 F.(2d) 436, 438;

Great Lakes Dredge v. Lynch, (CA 6, 1949) 173 F.(2d) 281, 284.

By this Stipulation, appellant, among other things, expressly conceded appellee's (petitioner below) right to have all issues pertaining to its affirmative defense of limitation of liability in the State Court action determined by the U. S. District Court as a matter within the exclusive admiralty jurisdiction of the Federal Court (Stipulation, Sec. 5, Tr. 31). Appellant also expressly agreed that it would not raise any question as to the jurisdiction of the U. S. District Court to thereafter proceed with an ultimate determination of the issue of limitation of liability after the State Court had adjudicated questions as to liability and damages (Stipulation, Sec. 7, Tr. 32).

While appellant's Statement of Points on this appeal claimed that the District Court was without jurisdiction to entertain the Petition for Limitation of Liability, it will be noted that appellant expressly abandons this jurisdictional question by footnote 1, appearing at page 3 of its brief.

The admiralty and maritime jurisdiction of the Federal Courts has been extended to include damages to property on land (appellant's dock) by a vessel on navigable waters (appellee's BARGE 535) by 1948 amendment, Title 46, U. S. Code § 740.

II.

STATEMENT OF THE CASE

In addition to the statement of background facts by appellant (Br. 3-11), the appellee invites the attention of this Court to the following additional facts:

BARGE 535 had undergone annual inspection by the U. S. Coast Guard, which was completed on December 3,

1958, only thirteen days before the explosion and accident involved in this proceeding (Tr. 71, 230, and Finding of Fact XIV, Tr. 124).

Appellee's employees Oldfield and Bunce were the maintenanceman and tankerman respectively engaged in operations preparatory to discharge of the bulk gasoline cargo from BARGE 535 several hours before the accident occurred (Tr. 71, 174). Both of these men had been issued certificates by the U. S. Coast Guard, qualifying them to serve as tankermen to handle gasoline products of the grade to be discharged from BARGE 535 (Tr. 71 and Finding of Fact XV, Tr. 124). Both maintenanceman Oldfield and tankerman Bunce were competent and experienced as to the duties assigned to them by appellee (Tr. 159-164, 178-179, 212, 232 and Finding of Fact XX, Tr. 126).

Detailed written instructions, rules and procedures for handling these gasoline barges and check lists to be filled out as to the pumping operations had been prepared, issued and were being used by appellee before the accident. Exhibits 12, 13, 14, 15 (Tr. 86). In addition, there had been frequent conferences at which safety procedures and hazards involved in the operations of loading and discharging bulk gasoline cargoes from the barges had been discussed between the supervisory personnel and the maintenanceman and tankermen employed by appellee at Pasco (Tr. 200-203, 206, 208). Instructions had been given that the maintenanceman and tankermen were to call any electrical malfunction on the barges to the attention of the Supervisor of the Pasco terminal of appellee, and that any major electrical work was not to be undertaken by the maintenanceman but was to be

handled by the electrician at the repair yard maintained by appellee at The Dalles, Oregon (Tr. 202-203, 209-210, 212).

On the date of this accident, the maintenanceman and tankermen were complying with all written instructions, rules and regulations, and also with verbal instructions and orders (Tr. 182, 184, 186 and Finding of Fact XXIII, Tr. 127-128). All equipment required by the U. S. Coast Guard for use on gasoline barges or tank vessels was provided and was in use at the time of the accident (Tr. 70-71 and Finding of Fact XIII, Tr. 123-124).

After the maintenanceman replaced the circuit breaker switch on the barge, the switch on this circuit was cocked and turned on and the lights functioned and continued to function in a normal manner for a period of from three to four hours before the explosion occurred during the final stages of the operation of discharging gasoline from the barge to the shore tanks (Finding of Fact XVII, Tr. 125 and State Court Finding of Fact V, Tr. 68).

The chain of command or management-employee hierarchy in appellee's company at the time of the accident was as follows:

A. Leppaluoto, General Manager	(Tr. 219)
Paul Light, Assistant General Manager	(Tr. 219)
E. R. Boyles, Supervisor of Petroleum Operations and Terminals	(Tr. 214, 235)
R. E. Williamson, Plant Superintendent, Pasco Terminal	(Tr. 197)

No officer, managing agent or supervisory employee of appellee was present aboard the BARGE 535 after its arrival at Pasco on the day preceding the accident. There had been no report to any of the management or supervisory personnel concerning any difficulty encountered by the maintenanceman or tankermen with the starboard electrical wiring circuit which resulted in replacement of the circuit breaker switch (Tr. 184-185, 203-205, 231-232 and Findings of Fact XVIII and XXI, Tr. 125-126).

III.

ARGUMENT IN SUPPORT OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECREE

A. PRELIMINARY STATEMENT:

In appellant's brief, it is recognized that the single question presented on this appeal is whether the findings of the District Judge entitled appellee to a limitation of liability under Title 46 U. S. Code § 183(a) (Br. 3).

It is the position of appellee that the single question raised in appellant's brief is a factual question which should be determined on the basis of application of the rule announced in 1954 by the U. S. Supreme Court in *McAllister v. United States*, (U.S. S.Ct., 1954) 348 U.S. 19, 99 L.ed. 20.

In its Specifications of Error, appellant takes specific exception to Findings of Fact XXV, XXVIII, XXIX, XXX and Conclusion of Law III (Br. 11-14). It also takes general exception to the Findings of Fact in their entirety and to the entry of judgment granting appellee a limitation of liability. Since appellant has taken no specific objection to Findings of Fact and Conclusions of Law other than as identified in its brief and mentioned hereinabove, it would appear that appellant has no real ground

for challenging the other Findings of Fact as made by the District Judge. *PACIFIC QUEEN,* (CA 9, 1962) 307 F.(2d) 700, 705 and footnote 5; *Rules of the U. S. Court of Appeals for the Ninth Circuit,* Rule 18 subdivision 2(d).

While the burden of proving that Findings of Fact are clearly erroneous is upon appellant and the trial court's findings must be accepted if supported by substantial evidence viewed most favorably to the appellee, *PACIFIC QUEEN,* (CA 9, 1962) 307 F.(2d) 700, 706, appellee will undertake to cite references to the evidence in the record supporting each of the specifically challenged findings. *Rules of the U. S. Court of Appeals for the Ninth Circuit,* Rule 18 subdivision 3.

B. FINDING OF FACT XXV as excepted to by appellant is as follows:

> "That Petitioner had exercised due diligence and had adequately performed any duty or obligation resting upon it as barge owner to instruct and educate its employees concerning the operations of handling and discharging bulk gasoline from its floating equipment, including BARGE 535 or to warn its employees concerning any known or probable hazards relating to the electrical equipment and circuit breakers installed on BARGE 535." (Tr. 128)

The record shows without contradiction that the following separate actions had been taken by appellee to instruct and educate its employees regarding the handling and discharging of bulk gasoline and to warn its employees concerning any *known or probable hazards* relating to the electrical equipment and circuit breakers on BARGE 535:

1. Detailed Rules and Regulations had been issued as of June 22, 1954 pertaining to procedures for handling

gasoline barges. Exhibit 12 (Tr. 86). These Rules and Regulations were in use and in effect at the Pasco terminal of appellee at the time of the BARGE 535 explosion (Tr. 227). There was a complete section on safety procedures (Tr. 225) and a section on barge unloading procedures (Tr. 226).

2. Individual Barge Inspection Reports were in use at Pasco and throughout appellee's system of terminals at the time of the accident. This form of report was to be filled out by the tankerman handling the loading or discharging operation and filed with the terminal office for appropriate review and action as required. These Inspection Report forms were in the nature of a check list and they contained a specific item requiring inspection and report "BEFORE AND DURING UNLOADING" as to the electrical wiring circuits on each barge and notation as to any corrective action taken or required by way of maintenance or repair. Exhibit 13 (Tr. 86).

3. Superintendent Williamson at the Pasco terminal had prepared detailed Barge Pumping Instructions. Exhibit 15 (Tr. 86). This document had been read and individually signed by the maintenanceman and all of the tankermen employed by appellee at Pasco before the BARGE 535 accident occurred (Tr. 200). There was specific instruction in this document requiring:

> "If any discrepancy on the barge or the pumping of barge, stop pumping and contact man in charge." (Exhibit 15)

4. Plant Superintendent Williamson had periodically discussed safety and maintenance procedures with Supervisor Boyles (Tr. 203) and with the maintenanceman and tankermen employed at Pasco (Tr. 200, 208). It was

definitely understood between the supervisory personnel and the maintenanceman and tankermen that the latter employees were to call the attention of Superintendent Williamson to any electrical malfunction (Tr. 201-203, 209-210). Also, it was understood and specified that the maintenanceman and tankermen were to restrict their activities on the electrical systems of the barges to replacement of light globes, running cords and similar work and to refer any major electrical work to the company electrician at The Dalles shipyard operated by appellee (Tr. 183, 201-203), even though Superintendent Williamson felt that maintenanceman Oldfield was qualified to do more electrical work (Tr. 212).

5. Supervisor Boyles spent from two to three days of each week at the Pasco terminal and went aboard the gasoline barges on almost every such occasion (Tr. 209, 219). He discussed safety and maintenance procedures with the maintenanceman and tankermen (Tr. 220). The subject of electrical maintenance was discussed "at every meeting" (Tr. 221), and maintenance and repair of electrical wiring and circuits on the barges were discussed on "numerous occasions" (Tr. 228-229). It was clearly understood that employees at the Pasco terminal were not to undertake to splice any wiring or to install any new wiring on the barges (Tr. 229). Supervisor Boyles, although having had some past experience with circuit breakers, was not aware of any hazard of an intermittent short existing along the line after a circuit breaker had been replaced and the lights functioned apparently normally (Tr. 250). Boyles had experience as to replacement of such switches and knew that a reserve supply was maintained at the Pasco terminal for this purpose (Tr. 221-222).

Captain House, who testified as an expert witness for appellee, was the Operations Manager and Port Captain for Washington Tug & Barge Company at Seattle (Tr. 289). He had also served as Master and Engineer of vessels, as Port Engineer and in other capacities for his company (Tr. 289), which has been engaged since 1946 in the specialized operation of transportation of gasoline and other light petroleum products (Tr. 289-290). He was something more than a "tug boat captain," as described in appellant's brief (Br. 36). Witness House testified that upon the basis of his experience in marine transportation of gasoline and his familiarity with barge electrical wiring and circuit breakers, the instructions, particularly the written instructions contained in Exhibits 12, 13, 14 and 15, conformed to the usual and customary type of instructions that would be used by a prudent operator of such vessels carrying bulk petroleum products in this area (Tr. 314).

In the early case of the *ANNIE FAXON*, (CA 9, 1896) 75 Fed. 312, this Court considered a limitation of liability proceeding involving claims for death of passengers and crew members resulting from the explosion of the boiler on a vessel operated on the Snake River. The boiler had been tested and passed by the U. S. Steamboat Inspection Service about eight months before the casualty. A licensed marine engineer participated on behalf of the shipowner in the government inspection, and this engineer had thereafter supervised and checked certain boiler repairs. When the vessel was placed back in service, crew members, without knowledge of the owner or its supervisory personnel, continued to operate and use the boiler after certain of its elements had become defective. The trial court

granted limitation of liability, and upon appeal, this Court affirmed, stating in part:

> "It was nevertheless held that the knowledge of the master, who had been charged by the owners with the duty of repairing the vessel, was not the knowledge of the owners, and that the owner may delegate to another the duty of suitably fitting out his ship, and thereby relieve himself from full liability, although such agent may have been negligent."
>
> *ANNIE FAXON*, (CA 9, 1896) 75 Fed. 312, 316.

On the appeal of the above case, it was argued that the shipowner was not entitled to rely upon inspection of the boiler by an "unskilled person." In disposing of this contention, this Court had the following comments regarding the duties of a shipowner in respect to maintenance of vessels in a situation quite comparable to the present case:

> "We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, unless the defects were apparent, and of such a character as to be detected by the inspection of an *unskilled person.* The record fails to show that the defects were of this character. * * * When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are *not required to have the skill and knowledge which are demanded of the inspector of a boiler.* It is sufficient if the corporation *employ, in good faith, a competent person to* make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concern injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer,

but which require for their detection the skill of an *expert.*" (Emphasis added.)

ANNIE FAXON, (CA 9, 1896) 75 Fed. 312, 314, 315.

The ANNIE FAXON, *supra,* has stood the test of time and critical review and has been cited with approval by other courts in more recent cases dealing with the same general question:

Coryell v. Phipps, (CA 5, 1942) 128 F.(2d) 702, 704;

Petition of Canadian Pacific Railway (The PRINCESS SOPHIA), (WD Wash. ND, 1921) 278 Fed. 180, 188, affirmed (CA 9, 1932) 61 F.(2d) 339;

The RAMBLER, (CA 2, 1923) 290 Fed. 791;

Petition of Val Marine Corp., (SDNY, 1956) 145 F. Supp. 551, 554.

In *The RAMBLER, supra,* the Court of Appeals for the Second Circuit considered questions as to an explosion accident and alleged negligence of supervisory personnel upon basic facts similar to those involved in the present case. In granting limitation of liability, the court referred to the "often quoted and approved decision of *The ANNIE FAXON*" in the Ninth Circuit. *The RAMBLER,* (CA 2, 1923) 290 Fed. 791, 792.

In *PERTH AMBOY NO. 1,* (SDNY, 1956) 144 F. Supp. 340, the court granted limitation of liability to an oil barge owner, holding that the owner's Port Captain was not negligent in failing to seek "expert advice" as to how best to deal with an oil spill. The court found that the oil spill was due to the negligence of a subordinate employee of the owner who held a certificate from the U. S.

Coast Guard as a tankerman. The court said:

> "On the other hand Johansen was a certified tankerman and there is not a scintilla of evidence that he was not completely qualified and competent * * *."
>
> *PERTH AMBOY NO. 1*, (SDNY, 1956) 144 F. Supp. 340, 341.

C. FINDING OF FACT XXVIII as excepted to by appellant is as follows:

> "That Petitioner was not in privity with any act or failure to act of the tankermen and maintenancemen employed by it which the Court in Cause No. 10527 may have found to have been the proximate cause of the accident." (Tr. 129)

Maintenanceman Oldfield testified that he had not reported to and had not consulted with either Pasco Terminal Superintendent Williamson or Superintendent of Terminals Boyles regarding the difficulty encountered with the electric lighting circuit on BARGE 535 before this accident occurred on the early morning of December 16, 1958 (Tr. 184-185).

Superintendent of Terminals Williamson testified that he had not been aboard BARGE 535 after its arrival at Pasco and had not been informed by any of the employees working under him as to the problem encountered with the electric lighting circuit on BARGE 535 before the explosion occurred (Tr. 203-205).

Superintendent of Terminals Boyles testified that he had no knowledge or report regarding difficulty experienced by maintenanceman Oldfield and tankerman Bunce with regard to the starboard wiring circuit on BARGE 535 and that he was not present at Pasco at the time the accident occurred (Tr. 231-232).

Boyles testified that while he had more knowledge than the ordinary person regarding the electrical wiring systems and use of circuit breakers on petroleum barges such as BARGE 535 (Tr. 239-240), he was not aware that the tripping of the circuit breaker was a warning that something was "wrong with the *circuit* being served by this device" and "beyond this device." (Tr. 240-241). Boyles testified that from his experience, he knew that the tripping of the circuit breaker might be caused by something within the condulet or circuit breaker box (Tr. 242, 250), and that from his experience, he had found that this was "quite often" the case (Tr. 242). Boyles testified that it was his belief and understanding that the circuit breaker itself functioned to protect against an arc caused by a short circuit (Tr. 244).

In addition, supervisor Boyles stated that he knew that maintenanceman Oldfield and tankerman Bunce were aware of the dual functions of circuit breakers as a switch and as a warning device (Tr. 248).

Expert witness Holt candidly conceded upon cross-examination by appellant's counsel that after the circuit breaker had been replaced, the lights on such a wiring circuit might function in an apparently normal operation for three to four hours before an intermittent short would manifest itself, but he stated that such a circumstance was only "remotely possible" (Tr. 283-284).

Captain House, as an expert witness, testified that it was customary in the marine industry on equipment such as this for tankermen or maintenancemen to replace circuit breaker switches without calling for the services of a shore electrician (Tr. 303).

D. FINDING OF FACT XXIX as excepted to by appellant is as follows:

> "That Petitioner was not negligent in failing to issue particular instructions or warnings to its maintenanceman and tankermen regarding proper procedures to follow in the event some difficulty or malfunction was encountered in the operation of electrical wiring circuits or circuit breaker switches aboard BARGE 535 while engaged in transporting, loading or discharging bulk gasoline products." (Tr. 129)

Appellee operated its own repair yard, including an electric shop, at The Dalles, Oregon, at which place the company expected to perform any major electrical repair or maintenance work required on the barges (Tr. 218).

Captain House, who has had many years of experience in operation of similar tank vessels and barges on Puget Sound, stated that under circumstances such as those involved in this case, he would consider it appropriate to allow the maintenanceman or tankerman to replace a circuit breaker switch. If the switch again kicked out after such replacement, Captain House would then have expected the maintenanceman or tankerman to leave the circuit alone until a shoreside repairman or electrician could check it out. He stated that the replacement of a circuit breaker switch would be considered as "normal small maintenance" which the owner or operator of gasoline barges would expect to be performed by its maintenanceman or tankerman (Tr. 301-303). He also stated that there was no Coast Guard regulation prescribing procedures to follow in such cases (Tr. 294).

Expert witness Holt, who had many years of experience—primarily in marine electrical installations and repair—stated that the proper practice when a circuit break-

er switch on a vessel such as BARGE 535 kicked out would be to:

(a) Make a visual inspection along the line; then

(b) Attempt to reset the kicked off circuit breaker; then, if the circuit did not function properly

(c) Change the circuit breaker switch in the unit.

If the lights on the wiring circuit then went on and continued to burn, expert witness Holt stated that he would assume the circuit breaker switch was faulty and that the condition had been corrected by replacement of the same (Tr. 269-275). Mr. Holt stated that this was the customary practice followed by operators of equipment in the marine industry and that it was not a customary practice to call for the services of shore electricians or licensed electricians before undertaking the above procedures (Tr. 275-278).

In fact, witness Holt testified that to undertake an Ohmeter or Megger test of the electrical wiring circuit before replacing the circuit breaker switch, as had been earlier suggested by counsel for appellant, would be inherently dangerous because of the hazard that an arc or sparks from a short circuit in the line might thereby be created (Tr. 277). Finally, expert witness Holt testified that in his opinion, the procedure followed by maintenanceman Oldfield and tankerman Bunce on BARGE 535 was proper (Tr. 273-275) and that it would be safe to continue using the lighting circuit on the barge without further testing (Tr. 276).

During the examination of expert witness Holt, in the course of colloquy with counsel regarding the line of examination of this expert electrician witness, the trial

judge stated:

> "THE COURT: How does he find it? Suppose he tested and never did find it, wasn't he at fault? If it is intermittent, it is just as hard for an electrician to find it as anyone else." (Tr. 266)

This observation by the District Judge eloquently demonstrates the problem facing appellee in trying to more specifically instruct, direct or warn its employees as to safety procedures or proper action to take with regard to a hazard of which the supervisory personnel were unaware, and which even an expert electrician might find difficult to locate.

E. FINDING OF FACT XXX as excepted to by appellant is as follows:

> "That under all the circumstances, Petitioner exercised due diligence and reasonable care as to instructing its employees regarding operation, repair and maintenance of the electrical equipment, including circuit breakers, on BARGE 535 before and at the time of the accident on December 16, 1958, and was not negligent with respect thereto." (Tr. 129-130)

The evidence in support of this finding overlaps the evidence previously referred to in support of Findings of Fact XXV and XXIX, which evidence is equally applicable here.

As pointed out by the trial judge, the determination of whether due diligence and reasonable care were used by appellee, and the nature and scope of instructions or warnings to be given, would depend to some extent upon the experience and qualifications of the maintenanceman and tankermen (Tr. 173).

Prior to the time of this accident, maintenanceman Oldfield had about fifteen years of experience in mechanical maintenance work, including some electrical work and including about six years with appellee and its predecessor as maintenanceman at the Pasco terminal (Tr. 159-163). He was regarded as a competent maintenanceman by his superiors, Mr. Williamson as Superintendent of the Pasco terminal (Tr. 199, 212) and Mr. Boyles, who was Supervisor of the Terminals (Tr. 232). Oldfield had prior experience with maintenance work on the lighting or wiring systems on these gasoline barges (Tr. 163-164), but he followed the established company practice of referring major electrical work or actual repair of wiring systems to the company electrician at The Dalles (Tr. 164).

Oldfield acknowledged in his testimony that he had received verbal instructions from his superiors in the company regarding safety procedures and precautions on maintenance and repair, including electrical systems on the barges (Tr. 182-183). On some previous occasions, he had referred such electrical work for accomplishment by the company electrician (Tr. 184). Both the written instructions, rules and regulations (Exhibits 12, 13, 14 and 15) and the verbal instructions and orders were being carried out and complied with in the course of the work performed by Oldfield and Bunce several hours before the explosion occurred (Tr. 182, 184, 186).

Oldfield was in charge of the tankermen (Tr. 166). Working with tankerman Bunce, he replaced the circuit breaker switch, after first making a visual inspection along the starboard wiring circuit on BARGE 535 and finding no breaks or defects (Tr. 72, 174-176, 194).

F. CONCLUSION OF LAW III as excepted to by appellant is as follows:

> "That Petitioner has sustained the burden of proving that the explosion and fire involving BARGE 535 at the Port of Pasco on December 16, 1958 occurred without the privity or knowledge of Petitioner, its corporate officers, managing agents or supervisory personnel in the managerial hierarchy." (Tr. 131)

This Court, when considering a similar question (then a *de novo* hearing on an admiralty appeal) as to the adequacy of rules and regulations pertaining to navigation, boat drills and other safety procedures in a limitation of liability proceeding, quoted in *The PRINCESS SOPHIA*, (CA 9, 1932) 61 F.(2d) 339, 346, from the United States Supreme Court decision in *LA BOURGOGNE*, (U.S.S.Ct., 1908) 210 U.S. 95, 126, 127, 52 L.ed. 973, 988, as follows:

> "The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a wilful departure from their requirements was indulged in, and was brought home to, or countenanced by, the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence."
>
> *LA BOURGOGNE*, 210 U.S. 95, 126, 127, 52 L.ed. 973, 988.

Based upon the facts as admitted, or not disputed by appellant in the Pretrial Order (Tr. 63-72), the evidence as a whole and particularly as referred to in the previous subsections herein, and the Findings of Fact as made by the trial court, we submit that the evidence does support this conclusion and that it is not *clearly erroneous* as claimed by appellant.

IV.

ANSWER TO ARGUMENTS OF APPELLANT

Appellant's first argument is to the effect that the Admitted Facts in the Pretrial Order, coupled with the allegedly clear showing of a total failure to adequately instruct the subordinate employees, establish *privity and knowledge as a matter of law* (Br. 16).

At the outset, appellee contends that the above statement is inaccurate and that the record is replete with evidence in the form of admitted or undisputed facts, testimony of witnesses and exhibits to show that the company had adequately instructed its employees.

The agreed Order of the District Court (Tr. 27-29) based upon Stipulation by appellant (Tr. 29-32) expressly reserved all questions as to appellee's right to limitation of liability under Title 46 U.S. Code § 183(a) for trial by the U. S. District Court after the State Court determined if there was any initial liability and also determined damages.

The findings and judgment of the State Court, insofar as they exceeded the restrictions of the Stipulation and District Court Order, or insofar as they encroached upon the limitation of liability question reserved for adjudication by the District Court, were not and could not be *res judicata*. The Stipulation expressly provided that *appellant waived* any claim of *res judicata* (Tr. 32, Sec. 6).

Having agreed to waive claim of *res judicata*, appellant cannot validly argue that the State Court findings decided the question of privity, knowledge or negligence of management personnel of appellee. It was for this reason that appellee *did not concede* the binding effect

of State Court Finding of Fact VI, and this was brought out by appellee's (petitioner's) Contentions Nos. 2, 4 and 6 in the Pretrial Order (Tr. 74-75).

Appellee went further in its Contentions by pointing out that the Amended Complaint of appellant in the State Court action did *not* allege any breach by appellee of any duty to either instruct, educate or warn its employees concerning use, maintenance and repair of circuit breakers. As pointed out in appellee's (petitioner's) Contention No. 3, this issue was not injected into the State Court action by appellant until after the trial proceedings, when a post-trial amendment was sought by Motion, which was vigorously contested by appellee (Tr. 74-75 and Br. 9).

It was a factual question as to whether the foreseeability of the explosion on BARGE 535 was related to any negligence of appellee at the management level. The District Court in trial of the limitation of liability issue decided this question in favor of appellee, although the State Court had found to the contrary (Finding of Fact VI, Tr. 51-52), this being a finding which appellee *did not concede to be binding* in the Pretrial Order in the limitation case before the District Court (Tr. 74-75). We submit that the evidence amply supports District Court findings on this point as discussed in detail in early sections of this brief.

The statement under heading 5 on page 15 of appellant's brief that there was "undisputed evidence" of appellee's failure to issue instructions as to safe practices in the event of malfunction of electrical systems is simply not true, as shown by numerous citations and references to the record as previously made. As to the statement by ap-

pellant on page 21 of its brief that appellee's evidence as to custom with respect to electrical malfunctions was "squarely met and flatly contradicted" by appellant, it would appear that the District Judge chose not to accept and follow the testimony and opinion of the *only witness* called by appellant. In fact, it is later suggested in appellant's brief that the testimony of this one witness (Kniseley) be "totally disregarded" by this Court (Br. 36).

The statement by appellant (Br. 20) that appellee had employed persons with insufficient training or skill for this particular job is not correct and is contrary to Findings of Fact XX, XXVI, XXIX and XXX (Tr. 126-130), which findings are clearly supported by the evidence presented at time of trial. Finding of Fact XX expressly covers the point that the tankermen and maintenanceman employed by appellee were "competent and experienced as to the duties required of them" (Tr. 126), and this finding was not claimed erroneous when appellant took exceptions to specific findings (Br. 11-14) as required by Rule 18 subdivision 2(d) *Rules of the U. S. Court of Appeals for the Ninth Circuit.*

Having in mind the extensive written instructions, rules and regulations issued and the verbal instructions and conferences of supervisory personnel with the maintenanceman and tankermen regarding the hazards of these operations, the use and maintenance of electrical equipment and the procedures to be followed, it is not understood how the appellant could now contend that "appellee's managerial personnel *gave no attention whatsoever* to the matter of precautions to be taken by its subordinate employees in the wake of electrical malfunctions" (Br. 21).

The quotation by appellant from 155 A.L.R. 157, as

contained in the decision of this Court in *Alaska Freight Lines v. Harry,* 220 F.(2d) 272, 275, is not disputed (Br. 23). It should be noted, however, that this Court included two additional sentences in its quotation in the above decision from the annotation, which are not contained in appellant's brief. These are:

> "It is well settled that foreseeability or probability of harm is an essential element of negligence. The duty to use care and the liability for negligence depend upon the tendency of the acts under the circumstances as *they are known, or should be known,* to the actor." (Emphasis added.)
>
> *Alaska Freight Lines v. Harry,* 220 F.(2d) 272, 275.

On the second portion of the argument in its brief, appellant contends that the District Court finding that liability should be limited is *clearly erroneous as a matter of fact* (Br. 24).

No mention is made by appellant in its brief of the controlling effect of the decision by the U. S. Supreme Court in *McAllister v. United States,* (U.S. S.Ct. 1954) 348 U.S. 19, 99 L.ed. 20, wherein it is stated:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. * * * A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,' (citing cases)."
>
> *McAllister v. United States,* 348 U.S. 19, 20, 99 L.ed.(2d) 20, 24.

This Court has recognized that the burden of proving that findings of fact are clearly erroneous is upon appel-

lant. As stated in the *PACIFIC QUEEN*, (CA 9, 1962) 307 F.(2d) 700:

> "* * * it is not incumbent upon *appellees* to persuade this court that the District Court's findings of fact are correct; on the contrary, the *appellants* must persuade this court that the District Court's findings of fact are, as specified by appellants, clearly erroneous."
>
> *PACIFIC QUEEN*, 307 F.(2d) 700, 706.

The findings of the District Court in this case that appellee's management personnel were not negligent involve findings of fact which are entitled to the protection of the "clearly erroneous" rule. In this Circuit, it is recognized that findings as to negligence or lack of negligence or unseaworthiness are findings of fact. *Ramos v. Matson Navigation Company*, (CA 9, 1963) 316 F.(2d) 128, 131; *Pacific Towboat Co. v. States Marine Corporation*, (CA 9, 1960) 276 F.(2d) 745, 752. Negligence becomes a question of law only where the facts are undisputed and but one conclusion can be reasonably drawn from such admitted or undisputed facts. *Yellowstone Pipe Line Company v. Kuczynski*, (CA 9, 1960) 283 F.(2d) 415, 418, 419.

It is asserted in appellant's brief that there was no conflicting evidence concerning negligence of appellee's management personnel and that, accordingly, the District Court's findings as to negligence were clearly erroneous (Br. 35). A similar suggestion was raised before and rejected by this Court in *Gypsum Carrier, Inc. v. Handelsman*, (CA 9, 1962) 307 F.(2d) 525. The statements by this Court in rejecting this point would seem to be equally applicable to the present situation:

> "Thus we need not consider whether a trial court's conclusion as to the existence of negligence is generally to be classified as one of fact or of law. Clearly enough in the present case it reflected a factual determination from conflicting evidence. There is nothing to indicate, as appellant suggests, that the District Court tested appellee's conduct against an improper standard of care."
>
> *Gypsum Carrier, Inc., v. Handelsman*, 307 F.(2d) 525, 528.

The following factors must be considered with respect to the application of the "clearly erroneous" rule:

1. District Court findings will not be disturbed unless they are clearly erroneous, regardless of what decision this Appellate Court might reach were it considering the same evidence in the first instance. *Puget Sound Pulp & Timber Co. v. O'Reilly,* (CA 9, 1956) 239 F.(2d) 607, 609.

2. This Appellate Court will view the evidence in the light most favorable to the prevailing party. *PACIFIC QUEEN* (CA 9, 1962) 307 F.(2d) 700, 706; *Axelbank v. Rony,* (CA 9, 1960) 277 F.(2d) 314, 316.

3. Appellee, as the party prevailing below, will be given the benefit of all inferences that may reasonably be drawn from the evidence. *PACIFIC QUEEN,* (CA 9, 1962) 307 F.(2d) 700, 706. *Sherman v. Lawless,* (CA 8, 1962) 298 F.(2d) 899, 902.

4. The burden of proof in establishing that findings of fact are clearly erroneous is upon the appellant. *PACIFIC QUEEN,* (CA 9, 1962) 307 F.(2d) 700, 706.

5. If this Court determines that the record is susceptible to two inconsistent inferences, it will not disturb the

findings, or favor the party (appellant) upon whom rests the burden of proof. *Sherman v. Lawless,* (CA 8, 1962) 298 F.(2d) 899, 902.

6. The evaluation and determination of ambiguous or conflicting testimony is to be made by the District Court and its determination will not be set aside on review unless this Court finds that it is "clearly erroneous." *Guzman v. Pichirilo,* (U.S.S.Ct., 1962) 369 U.S. 698, 702, 8 L.ed.(2d) 205, 209.

7. This Court will give due regard to the opportunity of the District Court to judge the credibility of the witnesses. *Gypsum Carrier, Inc., v. Handelsman,* (CA 9, 1962) 307 F.(2d) 525, 529.

8. This Court will not upset the factual findings of the District Court unless it is left with the definite and firm conviction that a mistake has been committed. *McAllister v. United States,* (U.S.S.Ct. 1954) 348 U.S. 19, 20, 99 L.ed. 20, 24.

In seeking to show that the District Court findings as to privity and knowledge were "*clearly erroneous as a matter of fact,*" appellant attempts to draw an analogy between the facts in this case and those in *States Steamship Co. v. United States, et al. (The PENNSYLVANIA),* (CA 9, 1958) 259 F.(2d) 458 with particular reference to the decisions by this Court upon the first and second rehearings in that case where the decree of the District Court was reversed and limitation of liability was denied.

It seems obvious that the factual situations in these two cases are quite different and, therefore, the rationale

for the ruling denying limitation in *States Steamship Co., supra,* would not be pertinent in this case. In *States Steamship Co.,* this Court found strong evidence of privity, knowledge, lack of due diligence and personal negligence of supervisory personnel of the shipowner. In the course of the opinion on the second rehearing, it is stated:

> "Our former opinion sufficiently details what the evidence showed as to Vallet's [port engineer] *connection with this crack problem from beginning to end* and his *complete knowledge* of the crack sensitiveness of the vessel." (Bracketed ours and emphasis added.)
>
> *States Steamship Co. v. United States, et al.,* (CA 9, 1958) 259 F.(2d) 458, 473.

Thus, while this Court found clear and convincing evidence of "complete knowledge" of the defect and danger in *States Steamship Co., supra,* such evidence is wholly lacking in this case.

Appellant concedes in its brief that the facts in *States Steamship Co., supra,* are "quite different" than those in the present case (Br. 17). Appellant also concedes in its brief that Supervisor Boyles of appellee "had no knowledge of the hazard" with respect to an intermittent short circuit (Br. 25).

Appellant undertakes in its brief to establish foreseeability by management personnel of appellee by stating that the danger of re-energizing the line after replacing a circuit breaker should have been "self evident to persons at the management level" of appellee; yet, in the following paragraphs, appellant points out that maintenanceman Oldfield, who had considerable experience with electrical wiring and circuit breakers, was not aware of

the particular hazard of an intermittent short circuit, which the State Court found was the cause of the explosion (Br. 26). Appellee did give warnings and issue instructions to its maintenance and operations personnel with respect to electrical malfunctions, notwithstanding the unsupported contention by appellant to the contrary (Br. 27).

Here again, the early statements by this Court in the *ANNIE FAXON*, (CA 9, 1896) 75 Fed. 312, 315 are important. A shipowner is not required to have the skill of an "expert" but sufficiently discharges its obligation if it employs "competent" persons to inspect and maintain its floating equipment. The evidence in this case shows such persons were unaware of the particular defect or hazard which is found to have caused the explosion and damage.

Lack of knowledge or means of knowledge is therefore the important and distinguishing factor between this case and *States Steamship Co. v. United States, et al., supra. The SILVER PALM,* (CA 9, 1937) 94 F.(2d) 776 and other cases relied upon by appellant are likewise distinguishable on the same basis (Br. 32-34).

In the course of the argument in its brief, appellant raises at several points a question as to the admissibility of evidence offered by appellee through expert witnesses as to custom or practice followed in the marine petroleum transportation industry with regard to instructions and precautions taken against hazards of explosion, and as to methods of dealing with electrical malfunctions (Br. 21, 28-30, 36).

Appellee does not disagree with the statement of the general rule by appellant that custom or practices of an industry are never *controlling* on the question of negligence (Br. 28). However, in this case, the operations and electrical equipment being considered were not of a type within the common knowledge of laymen, and it was on this basis that appellant offered expert testimony *as an aid* to the trial court in determining foreseeability and the proper standard of care (Tr. 305). The trial judge stated in its opinion that the evidence was received and considered on this basis (Tr. 344).

In a fairly recent action considered by this Court, damages were sought against the government for death of a child electrocuted while climbing a fence surrounding a power substation. The government had introduced expert testimony, over the objection of the plaintiff, by three electrical engineers concerning the custom and practice of electrical companies in providing safeguards around electric power substations. This Court affirmed the District Court's judgment in favor of the defendant, and on the question as to the admissibility of the testimony of such expert witnesses as to the custom in the electrical industry, it stated:

> "*Such evidence is admissible and competent for consideration by the trier of fact on the issue of whether or not negligence has been proven* (citing cases). This evidence is not controlling on the question of whether the defendant exercised due care under the circumstances, and the District Court in its opinion has so stated.
>
> "The District Court further stated '*customary practice is not ordinary care; it is but evidence of ordinary care*' (citing cases). We see no objection to the ad-

mission of this testimony for the purposes stated." (Emphasis added.)

Johnson v. United States, (CA 9, 1959) 270 F.(2d) 488, 491.

See also *Young v. Aeroil Products Company,* (CA 9), 1957) 248 F.(2d) 185, wherein evidence had been introduced at the trial as to the customary manner of operating or handling an elevator. In affirming the District Court's judgment in favor of the defendant, this Court stated as to the evidence of custom:

"*Customary conduct is an indicia of reasonable conduct,* but the two are not equated either in fact or in law. The District Court could well have regarded this non-compliance with the employer's orders as negligent behavior on the part of the decedent. *At least we cannot say under the circumstances that such a finding is clearly erroneous.*" (Emphasis added.)

Young v. Aeroil Products Company, (CA 9, 1957) 248 F.(2d) 185, 189.

In an action for wrongful death based on alleged failure to provide an employee with reasonably safe appliances, and failure to warn, to instruct, or to establish adequate rules, another appellate court affirmed the directed verdict entered by the District Court in favor of the defendant and stated:

"Ordinarily, fulfillment of that duty is established when it appears that the *employer conformed to the common usages of the industry,* for one cannot ordinarily be said to be negligent if he does that which ordinary men, like situated, do. He is not bound to discard standard appliances whenever a better one is put on the market (many cases cited)." (Emphasis added.)

Grammer v. Mid-Continent Petroleum Corporation, (CA 10, 1934) 71 F.(2d) 38, 40.

This rule has even been recognized by another Federal appellate court with respect to the custom of inspection of the electric power lines in an action involving the technical features and use of an electric circuit breaker. *Dunagan v. Appalachian Power Co.*, (CA 4, 1929) 33 F.(2d) 876. In rejecting plaintiff's contention that the trial court had committed error in admitting testimony of expert witnesses as to the customary method of inspection of power lines, the Fourth Circuit stated:

> "Objection was also made to certain testimony of these witnesses as to the custom of other companies in making inspection; *but this testimony was clearly competent.* It is true that the question of the exercise of due care is not to be determined solely with reference to the custom of other companies, *but evidence as to such custom is certainly competent for consideration by the jury upon that question.*" (Emphasis added.)
>
> *Dunagan v. Appalachian Power Co.*, (CA 4, 1929) 33 F.(2d) 876, 878, 879.

It is not understood why, or for what purpose, appellant refers to certain Coast Guard regulations in its brief (Br. 30). The facts not disputed in the Pretrial Order clearly establish that appellant was taking all precautions required by the U. S. Coast Guard in connection with the operation, maintenance of and the equipment aboard BARGE 535 (Tr. 70-71). The barge had undergone and passed annual inspection by the U. S. Coast Guard less than two weeks before the accident in question (Tr. 71). These facts were incorporated into Findings of Fact XIII and XIV (Tr. 123-124), to which findings appellant took no specific exception. Rule 18 Subdivision 2(d), *Rules of*

the U. S. Court of Appeals for the Ninth Circuit.

All of the witnesses testified that there were no other Coast Guard regulations applicable to this operation and this type of equipment, and that the Coast Guard regulations did not require that a licensed electrician be used in performing such work as checking an electrical wiring circuit or replacing a circuit breaker switch unit on BARGE 535 (Tr. 207, 230, 252-253, 256, 294).

In fact, this point was never raised by appellant during the trial of the action and no contention or issue of fact or law was presented to the trial court which would suggest that there had been any failure by appellee to comply with any U. S. Coast Guard regulations.

Appellant devotes several pages at the conclusion of the argument in its brief to the subject of *res ipsa loquitur* (Br. 36-38). Counsel for appellant well know that their initial contention in the State Court action as to the application of *res ipsa loquitur* was expressly abandoned by appellant and that at the conclusion of the State Court trial, appellant moved to amend its Complaint to allege specific negligence of management personnel in failing to issue instructions to its employees as the *sole ground* upon which a recovery was sought (Br. 8-9, Tr. 47, 49). We therefore fail to see any materiality to the discussion of *res ipsa loquitur* in appellant's brief.

V.

CONCLUSION

We respectfully submit that the Findings of Fact of the District Judge are not "clearly erroneous" but are fully supported by the evidence in the record. In addition, the Conclusions of Law correctly apply the legal principles which should control in this case. The Final Decree granting limitation of liability to appellee should be affirmed.

Respectfully submitted,

Charles B. Howa

CHARLES B. HOWARD

Thomas F. Pau

THOMAS F. PAUL

Proctors for Appellee.

SUMMERS, HOWARD & LEGROS
840 Central Building
Seattle 4, Washington

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Thomas F. Pau

THOMAS F. PAUL

Proctor for Appellee